

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

KENNY DREW SAYRE,

Plaintiff,

v.

Civil Action No. 2:10cv65

WARDEN EVELYN SEIFERT,

Defendant.

ORDER

On May 18, 2010, Magistrate Judge James E. Seibert filed his Report and Recommendation ("R&R")(Doc. 7), wherein the plaintiff was directed, in accordance with 28 U.S.C. § 636(b)(1), to file with the Clerk of Court any written objections within fourteen (14) days after being served with a copy of the Report and Recommendation. Plaintiff filed his objections on May 21, 2010 (Doc. 41).

The Magistrate Judge recommends that plaintiff's Application to Proceed Without Prepayment of Fees (Doc. 2) be denied, and that the case be dismissed without prejudice pursuant to 28 U.S.C. §1915(g), which provides that a prisoner shall not be permitted to proceed *in forma pauperis* if he has brought three or more actions or appeals that were dismissed as frivolous, malicious, or for failing to state a claim. The only exception under 28 U.S.C. §1915(g) is if the prisoner is under imminent danger of serious physical injury. Upon examination of the report from the Magistrate Judge, it appears to this Court that the plaintiff's action was properly considered by the Magistrate Judge in the R&R. Because the plaintiff has filed objections, the Court has conducted a *de novo* review of all matters now before it, and finds the plaintiff's objections to be without merit. More specifically, the Court finds that plaintiff has not proven that he is in imminent danger of serious physical harm, and thus cannot meet the standard for this exception to the three strikes provision

of § 1915. Finding the Magistrate Judge's R&R to accurately reflect the law applicable to the facts and circumstances before the Court in this action, it is hereby

ORDERED that Magistrate Judge Seibert's R&R be, and the same hereby is, **ADOPTED**. Accordingly, it is

ORDERED that plaintiff's Application to Proceed Without Prepayment of Fees (Doc. 2), shall be, and the same is hereby, **DENIED**. It is further


ORDERED that the above-styled civil action shall be, and the same is hereby, **DISMISSED WITHOUT PREJUDICE** pursuant to 28 U.S.C. §1915(g), and that this civil action be **STRICKEN** from the docket of the Court. It is further

ORDERED that the Clerk shall enter judgment for the defendant. It is further

ORDERED that, if plaintiff should desire to appeal the decision of this Court, written notice of appeal must be received by the Clerk of this Court within thirty (30) days from the date of the entry of the Judgment Order, pursuant to Rule 4 of the Federal Rules of Appellate Procedure. The \$5.00 filing fee for the notice of appeal and the \$450.00 docketing fee should also be submitted with the notice of appeal. In the alternative, at the time the notice of appeal is submitted, plaintiff may, in accordance with the provisions of Rule 24(a) of the Federal Rules of Appellate Procedure, seek leave to proceed *in forma pauperis* from the United States Court of Appeals for the Fourth Circuit.

The Clerk of the Court is directed to transmit a copy of this Order to all parties appearing herein.

DATED: April 1, 2011.



JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE